

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 6**

ABC TRANSIT, INC.

Employer

and

Case 06-RD-255829

FRANK MONTEMURRO

Petitioner

and

**GENERAL TEAMSTERS, CHAUFFEURS AND
HELPERS LOCAL UNION NO. 249 A/W
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS**

Union

DECISION AND DIRECTION OF ELECTION

The petition in this matter was filed by the Petitioner on February 6, 2020¹, under Section 9(c) of the National Labor Relations Act, as amended (Act), seeking to decertify the Union as the exclusive collective-bargaining representative of a unit of the Employer's full-time and part-time drivers, monitors and aides employed at the Employer's 201 Hahn Road, Pittsburgh, Pennsylvania facility.

On February 13, 2020, I approved a Stipulated Election Agreement in the instant case, in which the parties agreed that a Board-conducted manual election be held at the Employer's facility on March 16. Thereafter, on March 13, the Employer requested that the election be postponed in consideration of the employees' absences from work due to the effects of the Covid-19 pandemic in the United States. On March 16, the Acting Regional Director, Region Six issued an Order Postponing Election thereby, indefinitely postponing the election in light of the employees' continued absences from the workplace. On November 24, after the employees returned to the workplace and in light of continuing controversy concerning the election mode, the Acting Regional Director issued a Notice of Representation Hearing in order to determine if the election should be conducted as a manual election or a mail ballot election. A hearing was held on December 15, via videoconference, before a hearing officer of the National Labor Relations Board (the Board).

¹ All dates herein are in 2020, unless specified otherwise.

I. ISSUES AND POSITIONS OF THE PARTIES

The only matter in contention is whether to conduct a manual or mail ballot election. The determination of the method of the election is within the sole discretion of the Regional Director and generally, it is not an issue subject to litigation. See NLRB Casehandling Manual (Part Two), Representation Proceedings, Section 11228 and Section 11301.2. However, I am mindful that my decision regarding the election arrangements is subject to review by the Board. For that reason, the parties' positions concerning the election arrangements were solicited during the hearing.

The parties are not in agreement concerning the type of election that is appropriate in the instant situation. The Union has taken the position that the election should be conducted without further delay and is agreeable to a mail ballot election. The Petitioner and Employer have each taken the position that a manual election can and should be safely conducted in the present circumstances.

The Employer asserts that a manual election is appropriate citing three general rationales for its position. First, the Employer notes that approximately 23% of the bargaining unit has departed employment from the Employer since the petition was filed, and that the recent lull in employment resulting from the recent cessation of in-person schooling may result in more departures. The Employer believes that the election should be conducted after the return to in-person school date of January 11, 2021, so that those who will be voting in the election are those who will actually be employed in the bargaining unit. Second, the Employer, citing the Board's recent decision in *Aspirus Keweenaw*, 370 NLRB No. 45 (2020), notes the generally lower turnout in mail ballot elections. Finally, the Employer argues that it is willing and able to take all necessary safety precautions in order to safely conduct a manual election.

II. FACTS

The Employer provides bus transportation services to both public and private schools and the bargaining unit employees in this case provide these services for students of the North Hills School District ("School District") located in Allegheny County, Pennsylvania. On March 13 the School District announced an immediate closure for in-person instruction due to the Covid-19 pandemic. Consequently, and pursuant to a request from the Employer which was unopposed by the other parties, the Region indefinitely postponed the scheduled March 16 manual election due to the fact that bargaining unit employees would not be reporting to work on the day of the election. On about October 5 the School District's students returned to in-person instruction in a "hybrid" format, meaning on certain days of the week certain portions of the student body reported for in-person instruction. This created the need for the resumption of school bus transportation. On November 18, however, the School District again reverted to fully virtual instruction and the unit employees were again temporarily laid off. The School District returned to in-person instruction on January 11, 2021 and the unit employees were recalled to work.

The Employer's facility on Hahn Road in Pittsburgh is located in Allegheny County, Pennsylvania. On January 11, 2021, Allegheny County reported 368 new COVID-19 cases.

Overall, Allegheny County has reported 61,075 confirmed or probable COVID-19 cases and 1,192 deaths since the start of the pandemic.² Additionally, most recent data shows that the positivity rate in Allegheny County is currently 9.71 percent, with the positivity rate remaining consistently above 5 percent since November.³

III. BOARD LAW

On November 9, the Board issued its Decision on Review in *Aspirus Keweenaw*, 370 NLRB No. 45 (2020), wherein it “set forth more specific and defined parameters under which Regional Directors should exercise their discretion in determining election type against the backdrop of Covid-19.” *Aspirus Keweenaw*, 370 NLRB No. 45 slip op. at 4. Moving forward, the Board has identified the following six situations which suggest the propriety of using mail ballots to conduct elections:

(1) [t]he Agency office tasked with conducting the election is operating under ‘mandatory telework’ status...(2) [e]ither the 14-day trend in the numbers of new confirmed cases of Covid-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher...(3) [t]he proposed manual election site cannot be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size...(4) [t]he employer fails or refuses to commit to abide by the GC Memo 20-10 protocols...(5) [t]here is a current Covid-19 outbreak at the facility or the employer refuses to disclose and certify its current status...(6) [o]ther similarly compelling considerations.

Aspirus Keweenaw, 370 NLRB No. 45 slip op. at 4-8. “County-level positivity rate data should be obtained from official state or local government sources.” Id. at 6, fn. 25. If “some or all of the work force comes from areas outside the county, it may be appropriate to consider data from those other areas.” Id. at 6.

IV. APPLICATION OF BOARD LAW TO THE FACTS

Due to the significantly high testing positivity rate in Allegheny County, I find that a mail ballot election is warranted.

In its oral argument the Employer correctly noted the Board’s preference for manual elections, which the Board specifically recently reiterated in *Aspirus Keweenaw*, 370 NLRB No. 45 slip op. at 2. Further, In *San Diego Gas & Electric*, 325 NLRB 1143 (1998) the Board has set forth three specific circumstances in which Regional Director’s may exercise discretion to direct a mail ballot election:

“(1) where eligible voters are “scattered” because of their job duties over a wide geographic area; (2) where eligible voters are “scattered” in the sense that their work schedules vary

²<https://bao.arcgis.com/covid-19/jhu/county/42003.html>

³ <https://covid.cdc.gov/covid-data-tracker>

significantly, so that they are not present at a common location at common times; and (3) where there is a strike, a lock-out, or picketing in progress. “supra at 1145.

While it is clear that a Regional Director’s discretion to determine election arrangements is not unfettered, “extraordinary circumstances” may justify a departure from the specific circumstances enumerated in *San Diego Gas*. To this end, in *Aspirus Keweenaw* the Board specifically cited its own April 17 public announcement regarding the current “extraordinary circumstances” related to the pandemic in which it stated:

Consistent with their traditional authority, Regional Directors have discretion as to when, where, and if an election can be conducted, in accordance with existing NLRB precedent. In doing so, Regional Directors will consider the extraordinary circumstances of the current pandemic, to include safety, staffing, and federal, state and local laws and guidance.⁴

The Board then listed the six parameters, cited above, that Regional Directors should evaluate in determining the appropriateness of directing a mail ballot election in light of the ongoing extraordinary circumstances of the pandemic. The Board went on to state that “If one or more of these situations is present, that will normally suggest the propriety of using mail ballots under the extraordinary circumstances presented by this pandemic.”

One metric cited by the Board that suggests the propriety of using mail ballots to conduct an election during this pandemic is a 14-day testing positivity rate above 5 percent in the county where the manual election would be held. As noted above, the positivity rate in Allegheny County has been higher than 5 percent since November. Accordingly, based on the most recent data, I find that a mail ballot election is warranted in this case given the conditions of the ongoing pandemic in Allegheny County.

The Employer’s concerns of voter turnout are valid concerns in any election, and while, as the Board has noted, mail ballot elections do generally produce somewhat lower voter turnout than manual elections, neither the direction of a manual election at this time, nor the further delay in scheduling this election, would fully address those concerns or would outweigh the extraordinary circumstances with regard to the safety of conducting a manual election at this time. Further, scheduling a manual election in these circumstances presents its own particular voter turnout problem in that, with another unexpected change to the School District’s calendar, the employees would be faced with reporting to vote in a manual election at a time the bargaining unit is not scheduled to work, or face another indefinite delay of an election that has already been delayed for nearly 10 months.

V. FINDINGS AND CONCLUSIONS

Having carefully considered the record evidence and applying the applicable Board law to these circumstances, I find that a mail ballot election is required in this case given the continuing high testing positivity rate in Allegheny County, Pennsylvania.

⁴ <https://www.nlr.gov/news-outreach/news-story/covid-19-operational-status-update>.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the Board. Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows.

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.⁵

3. The Union is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

4. There is no contractual bar, or any other bar, to conducting an election in this matter.

5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

6. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time Drivers, Monitors, and Aides employed by the Employer at its 201 Hahn Road, Pittsburgh, Pennsylvania facility; excluding all office clerical employees, guards, professional employees and supervisors as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by General Teamsters, Chauffeurs and Helpers Local Union No. 249 a/w International Brotherhood of Teamsters.

A. Election Details

I have determined that a mail ballot election will be held in light of the extraordinary circumstances presented by the ongoing pandemic and the high Covid-19 testing positivity rate in Allegheny County, Pennsylvania.

⁵ The parties stipulated that the Employer, ABC Transit Inc., is a corporation engaged in the business of providing student transportation. Solely involved herein is the Employer's 201 Hahn Road, Pittsburgh, Pennsylvania facility. During the past twelve-month period, a representative period, the Employer derived gross revenues in excess of \$250,000 from the operation of its business. During the same period the Employer purchased and received goods and services valued in excess of \$50,000 directly from points outside the Commonwealth of Pennsylvania.

The ballots will be mailed to employees employed in the appropriate collective-bargaining unit. At 5:00 p.m. on Tuesday, January 26, 2021, ballots will be mailed to voters from the National Labor Relations Board, Region 6, 1000 Liberty Ave Rm 904, Pittsburgh, PA 15222-4111. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by February 2, 2021, should communicate immediately with the National Labor Relations Board by either calling the Region 6 Office at (412) 395-4400 or our national toll-free line at 1-844-762-NLRB (1-844-762-6572).

All ballots will be commingled and counted at the Region 06 Office on Tuesday, February 23, 2021, at 1:00 p.m. In order to be valid and counted, the returned ballots must be received in the Regional Office, prior to the counting of the ballots.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed as of **Monday, January 11, 2021**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by **Thursday, January 14, 2021**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file

a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review must be E-Filed through the Agency's website and may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, and must be accompanied by a statement explaining the circumstances concerning not having access to the Agency's E-Filing system or why filing electronically would impose an undue burden. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and therefore the issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated: January 12, 2021

/s/ Nancy Wilson

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